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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 1524

GARRETT MORRIS AND THE MORRIS PLAN LIFE INSURANCE CO. *Petitioners*

O. P. LEONARD, TRUSTEE OF THE TRUST ESTATES OF OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, AND MARTHA JANE LEONARD, AND J. M. LEONARD, MARY LEONARD, AND O. P. LEONARD, CO-TRUSTEES OF THE TRUST ESTATES KNOWN AS MARY LEONARD TRUST NO. 2, MIRANDA LEONARD TRUST NO. 2, MARTHA LEONARD TRUST NO. 2 AND MADELON LEONARD TRUST, RESPONDENTS, AND OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, MARTHA JANE LEONARD, MARY LEONARD, MIRANDA LEONARD TRUST, MARTHA LEONARD TRUST, AND MADELON LEONARD TRUST, INTERVENORS *Respondents*

Petition for Writ of Certiorari to The Supreme Court of the State of Texas

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No.----------

GARRETT MORRIS AND THE MORRIS PLAN LIFE INSURANCE CO. *Petitioners*

v.

O. P. LEONARD, TRUSTEE OF THE TRUST ESTATES OF OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, AND MARTHA JANE LEONARD, AND J. M. LEONARD, MARY LEONARD, AND O. P. LEONARD, CO-TRUSTEES OF THE TRUST ESTATES KNOWN AS MARY LEONARD TRUST NO. 2, MIRANDA LEONARD TRUST NO. 2, MARTHA LEONARD TRUST NO. 2 AND MADELON LEONARD TRUST, RESPONDENTS, AND OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, MARTHA JANE LEONARD, MARY LEONARD, MIRANDA LEONARD TRUST, MARTHA LEONARD TRUST, AND MADELON LEONARD TRUST, INTERVENORS *Respondents*

Petition for Writ of Certiorari to The Supreme Court of the State of Texas

---

The undersigned attorney, on behalf of Garrett Morris and The Morris Plan Life Insurance Company, petitions for a Writ of Certiorari to the Supreme Court of The State of Texas in this case.

OPINIONS BELOW

On March 6, 1970 by summary judgment Petitioners were denied a trial in the 17th District Court of Tarrant County, Texas, on the grounds:

> That there is no genuine issue of any material fact to be adjudicated; that Petitioners failed to plead a cause of action for which relief may be granted; that the former judgment is res judicata of all claims and defenses asserted (R—Tr. p. 45). (App. A)

The Court of Civil Appeals, Second Supreme Judicial District sitting at Fort Worth, Tarrant County, Texas, on July 10, 1970 affirmed the summary judgment holding in summary:

> We have concluded that the fact that the Insurance Department, after the original trial, placed a lower value on the Insurance Building than the approved value as of the date of trial or prior thereto does not raise a material fact issue which would afford any relief to the Appellants (Petitioners) in a bill of review action. Under the circumstances the summary judgment was proper (App. B), 457 S.W. 2d 653, rehearing denied September 11, 1970.

The Supreme Court of Texas refused writ of error, no reversible error on December 9, 1970 without other opinion and refused application for rehearing on January 13, 1971. (R—Certificate Supreme Ct. of Texas)

JURISDICTION

Petitioners complain of the denial of a right to a trial on their first application after injury by trial court, affirmed by Court of Civil Appeals, and the Supreme Court of Texas by refusal of writ of error, and jurisdiction is invoked on the following grounds:

(i) Writ of error refused, Supreme Court of Texas, no reversible error, December 9, 1970.

(ii) Motion for rehearing overruled by Supreme Court of Texas, January 13, 1971.

(iii) Under Title 28, Judiciary and Judicial Procedure, Section 1257 (3), United States Code Annotated and under Title 28, Judiciary and Judicial Procedure, Section 2101 (c), United States Code Annotated; and the 14th Amendment, Section 1, United States Constitution, United States Code Annotated, Constitutional Amendment 14 to end, p. 4.

QUESTION PRESENTED

Where by written contract of sale, the fitness of a product for use for a specified purpose is specially made the consideration for such contract, can the Petitioners as beneficiaries of such contract be denied the right of a trial for failure of contract consideration by the State courts where the same courts are open to Respondents as sellers for enforcement of their rights under such contract against Petitioners without depriving Petitioners of due process or equal protection of the law as required by the 14th Amendment, Section 1, of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. On March 20, 1953, Respondents entered into written contract for the sale of a building to Harlan Sloan et al for $873,750.00 conditioned as follows:

> "This contract is specifically conditioned that the Purchasers will forthwith, diligently proceed to procure from the State Insurance Commissioner approval of the Insurance Department for the capitalization by the proposed Life Insurance Company who will own the building, at a minimum of $900,000 capital value, and will present said subject to the Life Insurance Department and will endeavor to secure approval of such capitalization figure for the property during the week beginning March 23, 1953, and if the Purchasers are unsuccessful in obtaining approval of such minimum capitalization figure, then at the election of the Purchasers, this contract may be null and void if same is not obtained on or before the 10th day of April, 1953." (R—Pf. Ex. 1, pp. 1 and 15).

2. On April 10, 1953, the Texas Insurance Department approved the asset value of such building for $950,000 (R—Vol. I, pp. 330 and 333).

3. Delivery of possession on August 12, 1953, was by deed from Respondents to Harlan Sloan et al (R—Pf. Ex. 10, pp. 19 and 35) and they executed a $750,000 purchase money note (R—Pf. Ex. 6, pp. 12 and 35); Harlan Sloan et al deeded the building to the Chiro Life Insurance Co. the same day and it assumed such note (R—Pf. Ex. 9, pp. 17 and 35). Respondents released Harlan Sloan et al of any further liability on the $750,000 purchase money note (R—Pf. Ex. 11, pp. 23 and 35).

4. On December 18, 1954, Chiro Life Insurance Co. was consolidated with another life insurance company under a written agreement, such agreement providing in part:

9.

"That the new company shall assume all of the debts and obligations of both of the original companies and be responsible therefor."

10.

"That on execution hereof all of the assets of both THE MORRIS PLAN LIFE INSURANCE COMPANY and THE CHIRO LIFE INSURANCE COMPANY shall automatically be transferred and delivered to the new company, namely THE MORRIS PLAN LIFE INSURANCE COMPANY, in exchange for its stock on the basis of ten shares for each one share of common stock in the old companies, and said new company shall be entitled to all the stock, bonds, real estate

and other assets, whether real, personal or mixed, of every kind and character, including chose in action, claims, policies, benefits of every kind and character and description and the new company shall be in the same place and stead as if it had been a party to the original transaction involved in either of the original companies." (R—Pf. Ex. 14, pp. 35 and 176).

5. As the results of their liability arising out of the Consolidation Agreement, on January 1, 1955, Petitioner Morris Plan Life Insurance Co. executed a note for $550,000 to Respondents, representing the balance outstanding on the $750,000 purchase money note (R—Df. Ex. 18, pp. 82 and 220).

On August 1, 1956, Petitioner Morris to accommodate petitioner Morris plan executed a note for $150,000 to Respondents for credit to the last $150,000 of the $550,000 note (R—Df. Ex. 20, pp. 88 and 222).

On November 1, 1962, Petitioner executed a $75,000 surplus debenture to Respondents for $75,000 credit to the $550,000 purchase money note (R—Df. Ex. 12, pp. 75 and 162).

6. In 1967, Petitioners instituted suit in Cause No. 48,411-C and paid the required jury fee seeking relief on the purchase money notes on the grounds that the Insurance Department had withdrawn $123,750 of the required minimum approved value, recovery denied on grounds claim had been settled, waived, or barred, judgment summary in nature dated July 30, 1968, motion for new trial overruled September 18, 1969; affirmed on May 16, 1969, by Court of Civil Appeals with opinion, (App. C) *Morris v. Leonard*, 441 S.W.

2d 877 (Tex. Civ. App.), writ of error denied, N.R.E. by Supreme Court of Texas.

7. The present suit with the same trial No. 48,411-C on the jury docket, in the same court began after a subsequent withdrawal of approved value by the Texas Insurance Department resulting in loss of use of $500,000 additional asset value of such building, which Petitioners alleged resulted from the unfitness of such building as delivered by Respondents for its intended use as specified in the contract of sale (R—Tr., pp. 2-7).

TIME AND MANNER OF OBJECTION TO ERROR

The denial of due process and equal protection of the law as guaranteed by the 14th Amendment of the United States Constitution was first raised in the trial court by Petitioners' response to Respondents' motion for summary judgment (R—Tr. p. 23). Among points of error assigned on appeal to Court of Civil Appeals was denial of due process and equal protection of the law as guaranteed by the 14th Amendment, Section 1, United States Constitution. (Point No. 3) Both the supplemental motion for rehearing before the Court of Civil Appeals (Point of Error No. 1) and the application for writ of error before the Supreme Court of Texas (Point of Error No. 4) contained the following assignment of error:

> The Court erred in finding and holding that Petitioners' legal claim sounding in contract for in excess of $500,000 is dependent on vacation of the former judgment and such action by the Court is denial of due process and equal protec-

tion of the law to Petitioners and is repugnant to Article 1, Section 13 and 15, Constitution of the State of Texas and the 14th Amendment, Section 1, of the United States Constitution.

All of such assignments were overruled by the Courts without discussion.

REASONS FOR GRANTING WRIT

The consideration for the contract was the usability of the building for a minimum of $900,000 of capital assets by an insurance company; Petitioners were injured in September, 1969, when they lost the use of such building for $500,000 of such minimum $900,000 asset value; such loss resulted from failure of Respondents to deliver property fit for its contract use as subsequently discovered by the Insurance Department and was, therefore, failure of contract consideration, and denial of a trial on petition for relief due to such injuries was denial of equal protection and/or due process of the law.

1. The special condition in the sales contract makes the usability of the building as a capital asset by an insurance company in the minimum of $900,000, as reflected by the approval of the Texas Insurance Department, the necessary element before Respondents can enforce the contract for the purchase price. It was not the delivery of a building, but delivery of a building usable as a minimum of $900,000 capital assets by an insurance company that Respondents promised in exchange for the promise to pay the purchase price. Consideration is something given in exchange and the

inducement for the contract. *Texas Co. v. Dunn*, Tex. Civ. App., 219 S.W. 300, err. dismissed. The investment by an insurance company in Texas was limited to one office building at its reasonable market value, Article 3.34, Texas Insurance Code as amended in 1949, V.A.T.S.; therefore, approval by the Insurance Department was a prerequisite of assurance that it could be used for the minimum amount. The right to contract is both a liberty and a property right within protection of Amendment 14, Section 1, of United States Constitution. *Pyeatte v. Board of Regents of University of Oklahoma*, D.C., Okl. 1951, 102 F Supp. 407, affirmed 72 S. Ct. 567, 342 U. S. 936, 96 L. Ed. 696.

2. Petitioners alleged that after the former suit was concluded, that the Insurance Department because of the unfitness of the building as delivered by Respondents for use for contract purposes discovered such unfitness and withdrew an additional $500,000 of the required $900,000 approved value. That Petitioners lost the use of such building as an asset at that time in the amount of $500,000, and such loss caused new injury and damage which was actionable. In summary judgments, pleadings are accepted as true for purposes of determining whether they state a cause of action. *Gulbenkian v. Penn*, Tex. Sup. Ct., 252 S.W. 2d 929.

Under the contract Petitioners had no cause of action so long as they had the use of the property in the required minimum amount. That the minimum amount had been reduced to $700,000 and such claim

settled, waived or barred as reflected by the prior suit would not affect a new loss of $500,000 of such $700,000 reduced minimum. The rule that forbids splitting a cause of action is not applicable to a contract of a continuing nature, which is not terminated by a single breach. *Reserve Life Ins. Co. v. Shelton*, Tex. Civ. App., 415 S.W. 2d 281, writ of error dismissed. The position of the State courts is graphically illustrated by the finding and holding that the withdrawal of approval in September, 1969, of $500,000 of required minimum approved value was not a new injury only additional evidence of injury. Such finding totally ignores the fact that the use of the building as an asset is controlled by its approved value, and such withdrawal then and there reduced the asset value of the building to $200,000, thereby causing Petitioners a $500,000 loss in assets. Such loss destroyed capital assets as well as assets held for contract obligations to policyholders, thus causing injury to a new class of people. To impair such policyholder contract rights without the right of a trial thereon deprives them of property without any process of law, due or otherwise. A right of action accrues whenever facts come into existence that give rise to a cause of action. *Luling Oil & Gas Co. v. Humble Oil & Ref. Co.*, Tex. Sup. Ct., 144 Tex. 475, 191 S.W. 2d 716.

For a corporation which by law must maintain minimum asset requirements to do business, the loss in September, 1969, of $500,000 of usable assets was a massive loss reducing the value of the company to its injury, the injury of its stockholders and policyholders, and such injury did not occur until the Insurance

Department by an affirmative act deprived them of the use of such assets.

3. Petitioners alleged that the loss was unrelated to depreciation, and was due to the unfitness of the property for contract purposes as delivered by Respondents. That the late discovery of such unfitness by the Insurance Department and withdrawal of approved value caused a failure of contract consideration in the amount of $500,000. Such pleading state a cause of action for failure of contract consideration. *Gulbenkian v. Penn*, supra, 252 S.W. 2d 929. Failure of consideration for a contract gives rise to a cause of action in Texas. *Rutherford v. White*, Tex. Civ. App., 174 S.W. 930, err. ref. Failure of consideration for original note may be plead in action on renewal note. *Goodwin v. Abilene State Bank*, 20 S.W. 2d 1090, err. dismissed.

Where duty is imposed purely by contract, action for breach must necessarily be in contract. *International Printing Pressmen Ass'ts. Union v. Smith*, Tex. Sup. Ct., 145 Tex. 399, 198 S.W. 2d 729. A contract is executory when something remains to be done by either party. *Whiteside v. Bell*, Tex. Sup. Ct., 162 Tex. 411, 347 S.W. 2d 568.

4. The same State courts were open to Respondents for enforcement of payment of the renewal notes against Petitioners, which reflect upon their faces that they are renewals of the $750,000 purchase money note set out in the contract of sale as part of the consideration promised in exchange for Respondents' promise to deliver a building fit for use as an insur-

ance company capital asset in the minimum sum of $900,000. In the first trial, *Morris et al v. Leonard et al*, Tex. Civ. App., 441 S.W. 2d 877, writ of error denied, N.R.E., the courts denied a trial on Respondents' repudiation of the settlement agreement and the consequential failure of contract consideration for the first withdrawal of approved value by summarily finding that the notes were given for some other purpose; however, the faces of such notes contradict such finding:

> The $550,000 note (R—Df. Ex. 18, Vol. II) dated January 1, 1955, reads in part, "This note is executed as a portion of the purchase price of the hereinafter described property (building in question) and is executed in renewal and extension of that certain note in the original principal sum of $750,000, dated August 12, 1953, and executed by Harlan Sloan et al."
>
> The $150,000 note (R—Df. Ex. 20, Vol. II) dated August 1, 1956, reads in part, "This note is executed as part payment on that certain note executed by The Morris Plan Life Insurance Company and payable to the said O. P. Leonard, Trustee, et al, dated January 1, 1955, in the original principal sum of $550,000, and it is understood that this note shall be credited as payment on the last $150,000 due and payable on said note."
>
> The $75,000 debenture (R—Df. Ex. 12, Vol. II) dated November 1, 1962, reads in part, "This debenture certificate is executed pursuant to an agreement this date between the parties hereto whereby the maker is given credit for $75,000 on other secured indebtedness in exchange for the execution hereof."

That the contract in question was the contract under which the building was delivered was admitted by both parties in the former suit (R—p. 14, Vol. I, Pf. Ex. 20, Vol. II). Petitioners' present suit was the first application for relief after loss of use of $500,000 of assets due to Respondents' failure to deliver assets usable for contract purposes as promised. That Respondents, like Petitioners, relied on the Insurance Department as to such fitness merely points up the mistake of both parties, but it does not alter the fact that Respondents are responsible for such loss because they did not deliver a building fit for its intended use. Respondents' promise to do so was the consideration for the promise of Petitioners, standing in place of the original buyer, to pay the purchase price and failure of Respondents to perform their part of the contract gave Petitioners a cause of action on such contract on which they are entitled to a trial. Petitioners represent the declared beneficiary of the contract and are entitled to enforce it. *Dickason v. Mathews*, Tex. Civ. App., 335 S.W. 2d 658-661, reh. den., err. ref., N.R.E.

It was the fault of neither Petitioners nor the Insurance Department that Respondents failed to make good their contract promise, and the fact that Petitioners, in addition to their request for relief for new injury, ask for reformation of the former judgment, at least insofar as enforcement of the notes for payment of the balance of the purchase price of the building, was no reason for denial of the right to a trial on their contract rights.

A right of action which springs from a contract is property within the protection of the 14th Amendment of the United States Constitution. *Lamb v. Powder River Livestock Co.*, C.C.A. Colo. 1904, 132 F 434.

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. *Chambers v. Baltimore etc. R. Co.*, Ohio 1907, 28 S. Ct. 34, 207 U. S. 142, 52 L. Ed. 143.

The concept of equal protection of the law and due process both stem from the American ideal of fairness and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the law is a more explicit safeguard of prohibited unfairness than due process of law, but a discrimination may nevertheless be so unjustifiable as to be violation of due process. *Bolling v. Sharpe*, App. D.C. 1954, 74 S. Ct. 693, 347 U. S. 497, 98 L. Ed. 884, opinion supplemented 75 S. Ct. 753, 349 U. S. 294, 99 L. Ed. 1083.

CONCLUSION

Denial of a trial to Petitioners by the State courts was predicated upon the fact that there had been no injury subsequent to the former trial. Petitioners' right to complain being limited to loss of use of the building as an asset were injured when their right to use such asset at its depreciated value of $700,000 of assets was withdrawn and the right to use it for a maximum of $200,000 was substituted. If the loss in use in September, 1969, resulted from the unfitness of the building originally for its intended use as alleged, then Petitioners had a cause of action and denial of a trial is denial of both due process and equal protection of the law. If the right to equal protection or due process of law is to be denied even by omission, then it is no longer a right, but is a mere privilege to be dispensed at random depending upon the mood of the Court.

The rights of the some two thousand policyholders, the stockholders and Petitioners themselves are entirely different in this suit than in the former suit. Respondents' rights and obligations are also entirely different. There is no public policy which perpetuates judgments for the sake of injustice after a change in circumstances dissolves the foundation in fact and law upon which they rest.

Petitioners clearly had a cause of action; their property has been taken; their contract rights destroyed; their right to a trial denied, and there is ample grounds for granting a Writ of Certiorari by this Honorable Court to prevent a denial of due

process and equal protection of the law to Petitioners as guaranteed by the 14th Amendment, Section 1, of the United States Constitution, and for such Writ Petitioners respectfully pray.

Respectfully Submitted,

ERNEST MAY
1804 W. T. Waggoner Building
Fort Worth, Texas 76102
Attorney for Petitioners

CERTIFICATE OF SERVICE

Three copies of the foregoing shall be personally delivered before April 1, 1971, to the Honorable Warren Shipman III, McGown, Godfrey, Decker, McMackin, Shipman & McClane, Attorneys for Respondents, Eighteenth Floor, Commerce Building, Fort Worth, Texas 76102.

ERNEST MAY

APPENDIX A

JUDGMENT OF TRIAL COURT

NO. 48,411-C

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS, 17TH JUDICIAL DISTRICT

GARRETT MORRIS, ET AL.
VS.
O. P. LEONARD, ET AL.

SUMMARY JUDGMENT

On the 20th day of February, 1970, came on to be heard the Motion for Summary Judgment of all Defendants in the above entitled and numbered cause; and came on to be heard the counter-motion for summary judgment filed herein by Plaintiffs Garrett Morris and Morris Plan Life Insurance Company.

It appeared to the Court that Judgment was entered by this Court in this cause on July 30, 1968, in favor of the Defendants and against Plaintiffs Garrett Morris and Morris Plan Life Insurance Company. It further appeared that said Judgment was affirmed by the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth and was later again affirmed by the Supreme Court of Texas. After the said Judgment was affirmed by the Supreme Court of Texas, Plaintiffs Garrett Morris and Morris Plan Life Insurance Company filed on January 22, 1970, their pleading in the above entitled and numbered cause designated "Bill of Review" and deposited

with the Court a jury fee. The Defendants duly filed their Answer to said Bill of Review, and the Defendants in proper form and time filed a Motion for Summary Judgment that Plaintiffs' Bill of Review be dismissed and that Defendants be discharged with their costs. Plaintiffs then filed a counter-motion for summary judgment granting the relief sought in Plaintiffs' Bill of Review. Service of the motions for summary judgment filed by both Plaintiffs and Defendants was made, and all parties appeared before the Court on the 20th day of February, 1970.

After considering the pleadings, depositions, transcript and statement of facts prepared for the prior trial and appeal of this cause, including all exhibits admitted into evidence in the prior trial, the judgments and orders heretofore rendered in Cause No. 48,411-C by this Court, by the Court of Civil Appeals and the Supreme Court of Texas, and after considering the pleadings and affidavits submitted since Judgment was rendered by the Supreme Court of Texas, this Court finds that there is no genuine issue of any material fact to be adjudicated; the Court finds as a matter of law that Plaintiffs have failed to plead in their Bill of Review a cause of action for which relief may be granted; the Court finds as a matter of law that the Judgment of this Court on July 30, 1968, and the Judgments of the Court of Civil Appeals and the Supreme Court of Texas are res judicata of the claims and defenses asserted by Plaintiffs in their Bill of Review; and the Court finds as a matter of law that Defendants' Motion for Summary Judgment should be granted and that of Plaintiffs denied. It is

accordingly,

ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of Defendants herein be, and it is hereby granted, and it is ORDERED, ADJUDGED AND DECREED that the Bill of Review of Plaintiffs Garrett Morris and Morris Plan Life Insurance Company be, and it is hereby dismissed, and Defendants are discharged with their costs.

It is further ORDERED, ADJUDGED AND DECREED that th. Motion for Summary Judgment of Plaintiffs Garrett Morris and Morris Plan Life Insurance Company be, and it is hereby, denied.

All costs incurred herein are assessed jointly and severally against Plaintiffs Garrett Morris and Morris Plan Life Insurance Company, for which execution shall issue.

To which Judgment Plaintiffs in open court gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Signed this 6th day of March, 1970.

/s/ .....

TRUMAN ROBERTS, Judge
Presiding
17th Judicial District Court,
Tarrant County, Texas

APPROVED TO FORM:

McGOWN, GODFREY, DECKER,
McMACKIN, SHIPMAN & McCLANE

By /s/ .....
Warren W. Shipman, III

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ATTORNEYS FOR DEFENDANTS

/s/.....
GARRETT MORRIS

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Fort Worth, Texas 76102

ATTORNEY FOR PLAINTIFFS

APPENDIX B

JUDGMENT OF COURT OF CIVIL APPEALS,

NO. 17,128

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

GARRETT MORRIS ET AL., APPELLANTS

VS.

O. P. LEONARD ET AL., APPELLEES

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

This appeal is from a summary judgment in a suit brought in the nature of a bill of review to set aside a prior judgment on the grounds of "mutual mistake," newly discovered evidence, or both.

The judgment complained of was rendered against the appellants in a suit filed by the latter against the same appellees who are involved in the present case. This court affirmed the judgment of the trial court in the original suit on May 16, 1969. Morris v. Leonard, 441 S.W. 2d 877 (Fort Worth Civ. App., 1969). The Texas Supreme Court refused a writ, n.r.e.

Thus the original judgment attacked by the appellants has been finalized by appeal.

The sole basis for the bill of review is that on September 9, 1969, the Statutory Receiver of the Morris Plan Insurance Company expressed opinion that "the highest realistic sales price which could be obtained for such property (Insurance Company's building), should a sale be consummated, would not exceed $200,000.00."

In their Counter-Motion for Summary Judgment the appellants allege: "That the property known as the Insurance Building has never had a value in excess of $200,000 since 1952 when defendants first contracted to acquire it in a land swap."

The appellants argue that this post trial and post appeal new evidence of another opinion as to the value of the Insurance Building shows that there was a mutual mistake of fact on the part of all parties to the original action as to the value of such Building. It is further argued that such mutual mistake of fact adversely affects the value of the Insurance Company stock and the policies issued by it which in turn would adversely affect the financial status of the policy holders of the Company, including one of the appellants.

At this point, to avoid repetition, reference is made to the previous opinion of this Court in Morris v. Leonard, 441 S.W. 2d 877, supra, wherein the value of the same Insurance Building was involved in litigation and fluctuated from a high of about $1,000,000.00 to a low of $400,000.00. Such values were or could have been applied to the related issues of considera-

tion, value of the Insurance Company stock, the insurance policies and the affect of such value on the policy holders.

There is a vital distinction between a mutual mistake of fact and a mutual mistake of opinion. The mere fact that all of the parties to the prior suit or their witnesses did not share the same opinion as to the value of the Insurance Company Building as the one which was later expressed by the Insurance Department does not constitute a mistake of fact. Without doubt none of the parties to this litigation have or had any control over the Department of Insurance, the Statutory Receiver or the appraiser for either.

It has long been established that opinion testimony does not establish any material fact as a matter of law. Hood v. Texas Indemnity Ins. Co., 146 Tex. 522, 209 S.W. 2d 345 (1948); Board of Firemen's Relief & Retirement F. Tr. v. Marks, 150 Tex. 433, 242 S.W. 2d 181, 27 A. L. R. 2d 965 (1951).

In McDonald Texas Civil Practice, Vol. 4, Sec. 18.27, beginning on page 1490, four elements of a petition in a bill of review are set out and fully discussed. See text and authorities cited.

Under the authorities, mistake, as a basis for bill of review, means a mutual error of the parties or a mistake of the complainant coupled with an act of the opposing party which brought it about. The mistake must relate to matters of fact and not opinions which were incident to the trial of the original action. The several cases cited by McDonald on mutual mistake or accident can be of no comfort to the appellants.

See Notes 18-22, both inclusive, at page 1496 of same text.

The first of two issues to be resolved in a bill of review proceeding is: "Was the judgment complained of rendered as a result of fraud, accident, or mistake, without the negligence of the complainant either in the course of the former action or after judgment?" Section 18.29—F. Trial, p. 1503, Vol. 4, McDonald Texas Civil Practice.

Implicit in each of the elements of a bill of review is the requirement that the petitioner must show that he exercised due diligence to prevent the judgment complained of. The mere complaint of injustice without more is not enough.

The appellants are charged with knowledge of all facts which could have been discovered and obtained by due diligence at the time of the former trial.

We turn next to newly discovered evidence as a ground for the bill of review. There is authority to the effect that relief based upon newly discovered evidence is not available in a suit in equity to set aside a judgment after it has become final. Metropolitan Life Ins. Co. v. Pribble, 130 S.W. 2d 332 (Fort Worth Civ. App., 1939, err. ref.).

There is also authority to the effect that such an action may be based upon grounds of newly discovered evidence with certain limitations. Kelley v. Wright, 184 S.W. 2d 649 (Fort Worth Civ. App., 1944, affirmed 188 S.W. 2d 983).

The Kelley case also stands for the proposition that

"A liberal application of the rules of equity demands that the same principle involved by a motion seasonably filed for new trial on grounds of newly discovered evidence, at the term of court at which a judgment was rendered be applied to belated motions partaking of the nature of equitable bills of review."

The Supreme Court of Texas, in New Amsterdam Casualty Company v. Jordan, 359 S.W. 2d 864 (1962), said: " 'A new trial will not be granted on the ground of newly-discovered evidence, unless it is made to appear that it has come to the knowledge of the applicant since the trial; that it could not have been sooner discovered by the exercise of diligence; that it is not merely cumulative; that it is not for the purpose of impeachment.' Conwill v. Gulf, C. & S. F. Ry. Co., 85 Tex. 96, 19 S.W. 1017 (1892).

"See also McDonald, Texas Civil Practice, Vol. 4, Sec. 18.16; 31 Tex. Jur., Sec. 81, p. 90 et seq.; Texas Employers' Insurance Ass'n. v. Moser (Tex. Civ. App.), 152 S.W. 2d 390."

In the case at bar the appellants failed to allege or to show that the post trial opinion on value relied upon as a basis for the bill of review was not available to them at the time of the previous trial. The information is cumulative of the evidence received in the original trial. There has been no showing that the information is of such a character as will probably change the result of the previous trial.

Public policy which seeks the finality of trials requires a showing of diligence on the part of the par-

ties in preparing their cases for trial and in obtaining all evidence available to them.

"That the complainant has a meritorious case, and that he has been compelled to suffer an adverse judgment by circumstances wholly beyond his control, are the fundamental grounds on which the equity to demand a new trial must rest." 34 Tex. Jur. 2d 36, § 198.

Based upon the authorities above cited we have concluded that the fact that the Insurance Department, after the original trial, placed a lower value on the Insurance Building than the approved value as of the date of trial or prior thereto does not raise a material fact issue which would afford any relief to the appellants in a bill of review action. Under the circumstances the summary judgment was proper.

Since the appellants were unsuccessful in their effort to have the original judgment set aside we can see no necessity in discussing the various propositions which might otherwise be presented in considering the elements of a new and different judgment.

All points of error are overruled and the judgment of the trial court is in all things affirmed.

Jack M. Langdon,
Associate Justice.

JULY 10, 1970

APPENDIX C

JUDGMENT OF COURT OF CIVIL APPEALS,

NO. 17,018

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

GARRETT MORRIS ET AL., APPELLANTS

VS.

O. P. LEONARD ET AL., APPELLEES

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

In the trial court Garrett Morris, et al., as plaintiffs, brought suit against defendants O. P. Leonard, et al. Plaintiffs alleged an affirmative cause of action for damages flowing from an alleged breach of implied covenant of warranty as to quantity of value in a certain building when the building was sold (in 1953) to "promoters" of a life insurance corporation (which was to be known as the Chiro Life Insurance Company). In general, the circumstance upon which plaintiffs founded their contention that there was a covenant of warranty in the 1953 transaction was a representation of defendants made to the aforemen-

tioned "promoters", inducive of the purchase of the building, that they had paid therefor approximately $1,000,000.00 "in trade". The plaintiffs' theory was that they were entitled to complain of the defendants' breach under right as successors in the chain of title of those who were the "promoters" in 1953, or to rights of the Chiro corporation (as result of constructive fraud under a theory that the defendants knew the building was purchased to become its asset).

(Had such a cause of action been instituted by owners thereof, as plaintiffs here claim to be, the relief sought might well have been that of contract rescission, with a restoration of the parties' status quo. Due to passage of time, and to other factors, relief of such character would be impractical in the case under consideration even if equitable right thereto should be made to appear.)

In response to the affirmative claim advanced by the plaintiffs (as based upon the 1953 transaction) the defendants denied the existence of any implied warranty, and asserted right to avoidance in any event under allegations of the two and four year limitation statutes, waiver, estoppel, compromise and settlement, ratification and release.

By cross-action and counterclaim the defendants sought recovery of plaintiffs for their respective obligations past due and owing for the balance due on what had initially been a $550,000.00 note; the foreclosure of the deed of trust upon the building in question (as security for the balance owing on the note); for the balance due on another note for $150,000.00

and for foreclosure of a pledge lien on certain shares of stock in Chiro Life Insurance Company, which was security for that note; and for the establishment of the balance due on a certain $75,000.00 surplus debenture obligation committed to them.

In response to the counterclaim of the defendants the plaintiffs alleged that the notes in question were illegal; that obligations thereon were subject to condition(s) precedent which had not been performed; failure of consideration; breach of implied covenant of warranty (arising out of transaction between plaintiffs and defendants in 1955 when the former acquired all the stock of Chiro Life Insurance Company); and fraud arising out of misrepresentations that the building in question (part and parcel of the 1955 transaction in transfer of corporate stock) was worth a million dollars.

In reply to the defenses which were brought forward by plaintiffs' allegations in response to their counterclaim the defendants denied the facts alleged as support for the plaintiffs' theory of defense, and additionally—as applied to rights asserted and based upon the 1955 transactions—plead compromise and settlement, ratification, release, and the two and four year limitation statutes. The defendants also plead waiver and estoppel as applicable to plaintiffs' attempts to make the assertions against defendants on the latters' cross-action, with predicate therefor asserted to have arisen in and by the acts of the plaintiffs occurring from 1956 to date of trial.

Upon conclusion of all the evidence the trial judge,

expressing the opinion that there was no dispute between the parties as to any material fact, withdrew the case from the jury's consideration and rendered judgment on the theory that such was required as a matter of law. Thereby the plaintiffs were denied any affirmative relief, and the defendants were in general granted all the relief they sought, viz: personal judgments, foreclosures upon property with the proceeds from sales thereof to be applied upon said indebtedness by judgment, and declarations settling liabilities between the parties. Plaintiffs perfected an appeal.

Affirmed.

A basic premise, under which the plaintiffs claim, is that the defendants were guilty of actionable fraud as against the men who organized the Chiro Life Insurance Company, in the sale and transfer to them (in 1953) of the building in question at a sale price of $873,750.00. This building was the Insurance Building. The men referred to were those heretofore called "promoters". They will thus be referred to hereinafter.

Defendants' actionable fraud (under plaintiffs' theory) lay in their representations to the promoters, in 1953, that they had paid $1,000,000.00 for the Insurance Building "in a trade" of properties between themselves and third persons. Coupled therewith, and of importance under the plaintiffs' theory, was the fact that defendants were at all times aware that the intended purchased by the promoters was for the purpose of transferring the building to the new life insurance company they hoped to organize (and which

was organized prior to the closing of the 1953 purchase and sale transaction) at the highest possible valuation as corporate property belonging to a life insurance company. In that respect the defendants had endeavored to aid and abet the promoters in obtaining an approval by the proper authorities in the State's Insurance Department of a $950,000.00 appraisal of building "valuation". Decision of the Department, in respect to the evaluation of property acquired or to be acquired by a life insurance company and held as part of its capital assets, is controlling in respect to value thereof as part of the capital of such a corporation.

Under plaintiffs' allegations and evidence, the promoters of the life insurance company, which they intended to and did call by the name Chiro, were innocent dupes who were defrauded by the defendants because of the latters' representation that $1,000,000.00 had been paid "in a trade" for the Insurance Building. The promoters purchased the building at what would be $873,750.00, as a cash price, at approximately the same time the defendants acquired it "in trade". The promoters took title, executing therefor their personal notes, as to one of which security was afforded by a Deed of Trust on the building; then immediately thereafter transferred title over to Chiro. This was a three-way transaction wherein Chiro assumed the obligation to pay all the indebtedness evidenced by the notes, and the defendants released the promoters from all liability thereon.

That such would be done was theretofore under-

stood and agreed by the defendants, the promoters (as individuals), and Chiro (as a corporation and by and through its officers, formerly the promoters, who owned all the stock and therefore had total ownership). The only consideration paid by the promoters, other than by way of notes evidencing indebtedness to the defendants, was an amount in cash which we may take as the figure of $25,000.00. This amount was paid by the promoters, pursuant to contract with the defendants, to third parties as the real estate commission for promotion of the sale of the Insurance Building. The only consideration received by the defendants were notes totalling $848,750.00, one of which was in the amount of $750,000.00 secured by the Deed of Trust.

It is of importance to take note of the fact that the success hoped for by the promoters of Chiro failed to materialize. In 1954, by agreement with Chiro and those who had been its promoters, and because the Chiro stock was pledged as security for a $98,750.00 loan, the defendants took all the capital stock (with the resulting total ownership of all the Chiro property, inclusive of the Insurance Building), and the promoters ceased to have any connection with either Chiro or the Insurance Building. Since that time the promoters have made no demands upon defendants. Chiro, owned by and in the possession of defendants, could of course make no demands.

It was thereafter that plaintiffs first became associated with the defendants in relation to Chiro and the Insurance Building. In 1955 plaintiffs bought

Chiro through a purchase of defendants' stock. Involved in, and carried along as a necessary incident to the purchase, was the transfer of ownership of the Insurance Building. Title thereto was in Chiro, burdened, of course, by the amount Chiro owed on the notes for which the building stood as security. The burden was eased, however, by an agreed reduction of the balance owing.

However, our initial task is to test whether there was a jury issue in respect to actionable fraud in the defendants' 1953 sale to the promoters of Chiro.

We have concluded that there was no actionable fraud in 1953. Evidence in the record reflects that there is an absence of any issue of fact upon the matter of whether the defendants actually paid $1,000,000.00 "in a trade" for the Insurance Building. They did pay such amount through credits agreed upon, applicable to property "traded", by and between the parties to the transaction pursuant to which it was acquired. There having been no misrepresentation there would be no basis for complaint of actionable fraud, and no cause of action could be said to have accrued to the promoters. A representation by the defendants in the nature of representations of opinion upon the value of the building would furnish no basis for a case of fraud.

But, assuming such a cause of action could be said to have accrued, such was never at any time assigned by the promoters. It is our opinion and conclusion that if it ever arose, and if such cause of action persists, the right arose and remains in the original promoters.

But, assuming that such a cause of action was transferred by the promoters to Chiro, and/or became a cause of action belonging to it as against defendants as initial owner, that cause of action would in 1954 have become a property belonging to the defendants—as the succeeding owners of all the Chiro stock. Necessarily resulting was the merger and extinguishment of the cause of action whether considered to have originally belonged to Chiro or to its "promoters".

We have concluded that principles of law relative to the promotion and organization of corporations are without application in the control of proper disposition of the case before us. It is contended that they do have such effect. For example, it is plaintiffs' theory that equity would sieze upon the 1953 transaction in the interest of the public and the innocent persons who were anticipated to become and did become policyholders of Chiro. The contention might be accorded some verity in another case, but not in this. There having been nothing illegal in the 1953 transaction as actually consummated there could be nothing in events thereafter occurring which could make of it an illegal contract nor operative to relieve a party thereto of attendant liability.

In the promotion, organization, and operation of corporations there is a requisite of "good faith" between parties who are in a fiduciary relationship with one another. There is an inhibition against any manipulation which results in any fraud perpetrated as the result of "stockwatering", particularly as applied to one who profits from the dilution of the substance

of financial stability of a corporation. Reference is made to the text of 18 Am. Jur. 2d, p. 650, et seq., "Corporations", Chapter VI, "Promoters and Promotion of Corporations", Sub. B, "Duties and Liabilities of Promoters to Corporation, Stockholders, and Subscribers", and the sections thereof beginning at Sec. 109, "Generally; fiduciary relationship". Reference is also made to the text of 18 C. J. S., p. 547, et seq., "Corporations", Chapter V, "Promotion of Corporations", Sub. B., "Rights, Duties, and Liabilities as Between Promoters and Corporation", and the sections thereof beginning at Sec. 144, "In general", and to the same text at p. 667, et seq., Chapter VIII, "Capital, Capital Stock, and Shares", Sub. E, "Consideration for Issue of Stock and Payment Therefor", and the sections thereof beginning at Sec. 236, "Necessity for Payment".

The same principles which declare the liability of promoters, etc., as result of activities which result in the "watering" of the stock of a corporation, or the impairing of its capital structure, likewise apply to one who conspires with such a promoter or aids and abets his "stockwatering", etc. Furthermore, and as applied to a third person who manipulates one who is innocent in the premises so that as the result of the manipulation the corporate structure and the corporate stock becomes thus diluted there would exist similar liability.

From our analysis of the argument of the plaintiffs such must be in substance what they contend—i.e., that the promoters were innocent, but were duped by

the defendants so that as a result there was "water" in the stock of Chiro and, upon merger of Chiro and Morris Plan the same "water" would be in the stock of the latter. In that connection plaintiffs refer to the fact that the defendants furnished their own servant to promote the Insurance Department's approval of the Insurance Building at a valuation of $950,000.00, presumably in behalf of and to further the interest of the promoters, but, say plaintiffs, principally to further defendants' own interests in that they had the promoters contract to purchase their building, the binding effect of which was contingent upon such approval.

It is noted, however, that there was a total failure in what might be characterized as the defendants' attempt, through their loaned servant, to aid the promoters to obtain the approval of such $950,000.00 building valuation. Though such approval was at first given by the Insurance Department it was withdrawn before defendants and the promoters had concluded their transaction in reliance thereon, or pursuant to their contract.

The defendants and the promoters did subsequently conclude a sale of the Insurance Building. However, that sale was upon another and different contract—one in connection with which nothing improper could be said to have been done by the defendants (as by conspiracy with the promoters, or by way of a manipulation of the promoters) so as to accomplish it. Assuming that by the promoters' subsequent delivery of the Insurance Building to Chiro its stock was

"watered" and/or the value at which the Insurance Building was taken as a part of its capital was so inflated that its financial stability was impaired, the transaction whereby this was done (one by and between the promoters and Chiro) would not be a transaction the result of which created in Chiro any cause of action against the defendants. If as a result of such a transaction a cause of action ever existed it would have belonged to the promoters. See 37 Am. Jur. 2d, p. 396, "Fraud and Deceit", Sec. 299, "Effect of assignment or transfer; rights of assignee."

Whatever is received becomes a part of the capital of the corporation. Necessarily it is upon and as result of some agreed valuation that property such as the Insurance Building becomes part of such capital, the measure being monetary value. For the corporation it is its representatives who are vested with authority to agree upon the value. Only in the event the agreement of these representatives should be declared unfair or dishonest would disavowance of the transaction be sustainable and the transaction set aside in a suit in which they would be primary defendants. It would be possible to reach other defendants, if at all, by and through those who might be found to be primarily liable. Such disavowance would ordinarily be a right possessed only by the corporation, its stockholders, and their privies. An exception would be an instance where the public interest was involved.

Aside from the want of plaintiffs' entitlement to complain (as successor to Chiro and/or to its stockholders' right of action), and treating the case as

though it were one prosecuted by the promoters themselves, or through them by Chiro, there appears nothing in the actions of the defendants in which any cause of action against them might be founded. The plaintiffs' subsequent discovery of the amount of revenue stamps on the deed under which the defendants originally received title to the Insurance Building was a circumstance in which they believed their cause of action could be grounded. Revenue stamps affixed to the deed indicated the fact, and created the presumption, that the consideration paid by the defendants for said building was only $500,000.00. In other words, say plaintiffs, the number of stamps constitute evidence that the $1,000,000.00 "in trade" represented to have been paid, and an inducement because of which Morris Plan purchased Chiro stock, was not in fact paid by defendants—and that there was falsity in their representation that $1,000,000.00 had actually been paid.

The "presumption" to that effect in plaintiffs' favor, which under one hypothesis could be said to have become arisen, vanished upon the introduction of undisputed affirmative evidence that the consideration the defendants had actually paid for the property was the $1,000,000.00 as represented. Proof to that effect not having been countered by any evidence to the contrary, and affirmed by additional evidence from witnesses whose credibility was not cast in issue, will be deemed conclusive. 23 Tex. Jur. 2d, p. 101, et seq., "Evidence", Ch. IV, "Presumptions and Inferences", Sec. 65, "In general; Definitions and distinctions", and Sec. 70 (p. 112), "Rebuttal of disputable pre-

sumptions".

Aside from the question of plaintiffs' entitlement to complain, and assuming such right existent, there was nothing in the 1953 transaction, pursuant to which the defendants parted with their title to the Insurance Building and took lien rights thereon as security for payments of notes representing a part of the purchase consideration, which could have been said to be tainted with any illegality. Therefore any new promise to pay such notes—as part of purchase price consideration for the Insurance Building—could not be tainted by any wrong or illegality, through substitution of the new promise to pay, because there was no taint to follow the transfer.

The situation simply does *not* present a case having analogy to that upon which plaintiffs found a rather compelling argument. We are certain that ours is not a transaction germane to an illegal transaction but collateral to it; character of the transaction in Wegner Bros. v. Biering & Co., 65 Tex. 506 (1886).

Even if there had been any actionable wrong in the organization of Chiro, or in the transaction whereby the Insurance Building became its property, that fact would not contaminate plaintiffs' transaction with the defendants in 1955. (What is meant is: if there had been anything theretofore done by anyone, pursuant to which there was occasioned any "water" in the stock of Chiro, or as result of which its capital structure was impaired, it would nevertheless be immaterial as applied to the 1955 transaction. Chiro and the stock of that corporation, whatever its con-

dition, "watered" or not, was merely the subject of a transfer transaction between the parties in 1955.)

It was in response to the suit by defendants, by way of cross-action for collection of indebtedness evidenced by notes due from plaintiffs, that plaintiffs attacked the rights thus asserted against them. Defendants' suit to reduce the plaintiffs' indebtedness to judgment had reference to that indebtedness arisen pursuant to the transaction (of 1955) when the defendants sold plaintiffs all their Chiro stock. Pursuant to subsequent transactions there were alterations in those obligations initially arisen. However, it was in reference to the original sales transaction that plaintiffs defensively asserted fault, along with a claim of illegality or unenforceability of the obligations upon which the defendant sued.

To be remembered is the fact that in 1954 the defendants succeeded to all the stock in Chiro. As a result the Insurance Building constituted property belonging to Chiro, but mortgaged to defendants. The defendants could handle such property as they chose. In other words they could transfer the building to themselves, as a transfer from Chiro (which they completely owned), or they could leave it as it was—as property belonging to Chiro. Defendants' ownership was complete, either direct or through agent. There seems to be no question but that all interested parties at that time deemed the building to have a greater value as the home office location of a life insurance corporation, with title in such corporation, than would be the case if defendants caused them-

selves to appear as direct owners.

Incident to such conclusion on the part of the defendants, plaintiff Garrett Morris was approached by their attorney for the purpose of ascertaining whether Morris' services were available to operate Chiro as its manager and as trustee for the defendants, with possible end in view of Morris' purchase of Chiro (through purchase of defendants' stock). Such a purchase would of course carry with it the Insurance Building; though Chiro also owned some office furniture, supplies, etc. Garrett Morris was principal stockholder and officer of the Morris Plan Life Insurance Company, which did not own a home office building as part of its capital structure.

Perhaps it was contemplated from the beginning that if Mr. Morris would take over the operations of Chiro he would decide to merge it with his own company pursuant to a stock purchase transaction as result of which Morris Plan would own Chiro and the Insurance Building. In any event such result did take place after Mr. Morris had operated Chiro for about five or six months. The purchase transaction was closed on January 1, 1955, and the purchaser of the Chiro stock was Morris Plan Life Insurance Company.

According to Mr. Morris the transaction was closed upon the following basis: cost to Morris Plan of all the Chiro stock and of the company in its entirety, with all indebtedness paid, would be $873,750.00. This would be accomplished by considering the outstanding indebtedness of $223,750.00 to be a deduction to be applied in favor of Morris Plan to the larger figure, so

that aside from such indebtedness there would be a $650,000.00 balance to be paid to the defendants. Since the amount represented as indebtedness owing by Chiro to the defendants on the Insurance Building was considerably in excess thereof it was agreed by the defendants that the $750,000.00 debt against said building would be reduced to the figure of $650,000.00, so that when the $223,750.00 in outstanding debts of Chiro were added thereto there would be accounting for the $873,750.00 cost price to Morris Plan. Of said $650,000.00 which defendants were to receive as Net consideration Morris Plan agreed to pay and did pay the amount of $100,000.00 in cash. This left the balance owing the defendants for the stock of Chiro purchased from them the amount of $550,000.00, fully secured by their lien against the Insurance Building. This they had held from the time in 1953 when the building was sold to the "promoters" of Chiro. The defendants had, however, arranged with Morris Plan —pursuant to the transaction of sale and purchase of Chiro stock—to take Morris Plan's note as "in renewal and extension" of the note originally given by the "promoters". However the note balance was reduced so as to cause it to conform with the new balance of indebtedness: $550,000.00.

Pursuant to concluding the foregoing transaction the Insurance Building, in early 1955, stood as a part of the capital structure of Morris Plan at an "approved" valuation on the part of the Insurance Department of the State of Texas of $873,750.00. However, that the Department could at "any time", upon examination of an insurance company, cause any invest-

ment of such company to be appraised at the expense of the company. In 1956 the Insurance Department conducted an examination of Morris Plan. Incident to such examination the examiner questioned the "value" of the Insurance Building. In consequence there was a reappraisal of the building in question for purpose of determining its proper monetary value as an investment under the code. Following and as a result of the reappraisal it was required that there be a reduction of what had been the $873,750.00 "approved" valuation of the Insurance Building (for Insurance Department purposes) to the amount of $700,000.00, as "approved" valuation.

Coupled with additional reasons occasioning financial stress the reduction in the "approved" value of the Insurance Building, as a property of investment making up part of Morris Plan's capital, caused its "impairment" in that (as result thereof) there was an imbalance of the company's assets and liabilities. This meant that Morris Plan had a little less than three months within which to arrange affairs so that there would be an elimination of the "impairment", to the satisfaction of the Insurance Department. Should the company fail so to do, within the period allowed, it would be subject to forfeiture of its license to do business.

In correction of the "impairment" Garrett Morris borrowed from the defendants the sum of $150,000.00, giving his personal note secured by his stock in Morris Plan. This $150,000.00 he paid to defendants, in behalf of Morris Plan,—to be applied to reduce the in-

debtedness of that company's note. Such note was that for which the Insurance Building stood security. This transaction occurred in August of 1956. In substance this altered the consideration defendants were to receive for their Chiro stock pursuant to the transaction of January, 1955, to the following: $100,000.00 in cash received from Morris Plan; $150,000.00 by way of credit on balance owing by Morris Plan because of payment by Garrett Morris; with balance owing of $400,000.00. Coupled therewith, of course, was a new $150,000.00 debt—on Garrett Morris' personal note—as security for which he had pledged his stock in Morris Plan.

About six year later, in 1962, the plaintiffs sought additional relief of the defendants. Mr. Morris, by a letter dated July 18, 1962, proposed that the defendants accept his personal note for an additional $200,000.00—to be credited on the Insurance Building note. Attempts to arrive at some agreement by the parties had not borne fruit as of August 3, 1962. On that date Mr. Morris—as for both plaintiffs—wrote a letter to defendants in which there was a claim of failure of consideration in the original purchase of the Chiro stock (in 1955), and requesting a reformation of contract(s) under some reasonable solution. Subsequently, on September 24, 1962, plaintiffs threatened "to bring suit for reformation of the entire agreement . . . unless we can get a substantial adjustment on the base note."

Later in 1962 the parties arrived at an agreement pursuant to which defendants accepted a surplus de-

benture from Morris Plan in the amount of $75,-000.00, and credited the Insurance Building note with that amount. In connection therewith the defendants secured a release in writing from plaintiffs of "any and all claims or causes of action of any kind or character . . . ."

Subsequently, in 1967, following fruitless attempts by the parties to resolve other and newly arisen problems occasioning requests by and in behalf of the plaintiffs for a renegotiation of times for and modes of making payment of the notes aforementioned, and/or refinancing in general, the plaintiffs instituted this suit. Cross-action by the defendants was to convert to judgment the respective indebtedness owing them by each of the plaintiffs, plus ancillary relief by way of foreclosure, etc.

When Morris Plan entered into the transaction with the defendants in 1955 there had been discussions during the course of which defendants had represented that as consideration for their original acquisition of the Insurance Building they had given or paid "in trade" the amount of $1,000,000.00. As heretofore indicated, the evidence relative to the transaction in question is conclusive that such representation was true and that such amount "in trade" was actually paid by defendants.

Even if that were not the case we do not think it a matter in doubt but that plaintiffs were not thereby induced to purchase the stock in Chiro, incidentally acquiring the Insurance Building. Disregarding the matter of plaintiffs' cost of acquisition, plaintiffs were

fully informed that the amount the defendants would receive for the building, pursuant to the 1955 transaction, would only be $650,000.00, $550,000.00 of which would be by note. Defendants could have foreclosed against Chiro and acquired the Insurance Building free and clear of ($223,750.00) outstanding indebtedness of Chiro under their mortgage security. Such was within the plaintiffs' knowledge. Though it might be correct to say that plaintiffs paid more than $650,000.00 for the building it would nevertheless be correct to say that defendants received no more than this for the building *plus* their Chiro stock.

Since there was no issue raised on plaintiffs' actionable fraud theory, either in the 1953 transaction between defendants and the promoters or in the 1955 transaction between defendants and plaintiffs, the consideration for the notes upon which the defendants counterclaimed was unquestionably lawful, and there could have been no failure of (defendants') consideration either for the Insurance Building or for the Chiro stock.

Though we forego discussion we will add that even should we err in our holding, hereinabove, plaintiffs have estopped themselves upon a charge of fraud by their actions between 1956 and 1962 (in particular by the release transaction of 1962). See Champlin Oil & Refining Company v. Chastain, 403 S.W. 2d 376, 385 (Tex. Sup., 1965).

Further discussion is warranted upon the contention of Garrett Morris that in any event he would not be liable for the payment of interest, as decreed by

the judgment on his $150,000.00 personal note to the defendants, from August, 1962 (when interest thereon was last paid) and February, 1967, absent determination of fact issues by the jury.

This contention necessarily rests upon a forbidden consideration by the jury of evidence inhibited under the parole evidence rule. Without such consideration no fact issue could arise. Our conclusion, therefore, is that this point of error should be overruled.

All points of error have been considered and are severally overruled.

Judgment is affirmed.

Frank A. Massey,
Chief Justice.

MAY 16, 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 1524

GARRETT MORRIS AND THE MORRIS PLAN LIFE INSURANCE COMPANY, *Petitioners*

vs.

O. P. LEONARD, TRUSTEE OF THE TRUST ESTATES OF OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, AND MARTHA JANE LEONARD, AND J. M. LEONARD, MARY LEONARD, AND O. P. LEONARD, CO-TRUSTEES OF THE TRUST ESTATES KNOWN AS MARY LEONARD TRUST NO. 2, MIRANDA LEONARD TRUST NO. 2, MARTHA LEONARD TRUST NO. 2 AND MADELON LEONARD TRUST, RESPONDENTS, AND OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, MARTHA JANE LEONARD, MARY LEONARD, MIRANDA LEONARD TRUST, MARTHA LEONARD TRUST, AND MADELON LEONARD TRUST, INTERVENORS *Respondents*

Brief In Opposition to Petition for Writ of Certiorari to the Court of Civil Appeals For the Second Supreme Judicial District of Texas

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 1524

GARRETT MORRIS AND THE MORRIS PLAN LIFE INSURANCE COMPANY, *Petitioners*

vs.

O. P. LEONARD, TRUSTEE OF THE TRUST ESTATES OF OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, AND MARTHA JANE LEONARD, AND J. M. LEONARD, MARY LEONARD, AND O. P. LEONARD, CO-TRUSTEES OF THE TRUST ESTATES KNOWN AS MARY LEONARD TRUST NO. 2, MIRANDA LEONARD TRUST NO. 2, MARTHA LEONARD TRUST NO. 2 AND MADELON LEONARD TRUST, RESPONDENTS, AND OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, MARTHA JANE LEONARD, MARY LEONARD, MIRANDA LEONARD TRUST, MARTHA LEONARD TRUST, AND MADELON LEONARD TRUST, INTERVENORS *Respondents*

Brief In Opposition to Petition for Writ of Certiorari to the Court of Civil Appeals For the Second Supreme Judicial District of Texas

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The above-named Respondents hereby reply to the Petition for Writ of Certiorari filed herein.

JURISDICTION

The Honorable Supreme Court of the United States does not have jurisdiction of this cause. There is no federal question involved. Petitioners contend that they have been deprived of a trial. In fact, however, Petitioners have already had a trial on the identical cause of action now being asserted by Petitioners. The cause of action asserted by Petitioners was tried in the 17th Judicial District Court of Tarrant County, Texas, where judgment was entered for Respondents and against Petitioners on July 30, 1968. The Court of Civil Appeals for the Second Supreme Judicial District of Texas affirmed the judgment on May 16, 1969, and the Supreme Court of Texas, on November 17, 1969, refused Petitioners' Application for Writ of Error, "no reversible error." Petitioners did not petition to the Supreme Court of the United States for Writ of Certiorori with respect to the judgment rendered on July 30, 1968.

QUESTION PRESENTED

The question presented in this case is not, as Petitioners state, whether a citizen involved in a contract dispute is entitled to a trial. Petitioners have already had a trial wherein the dispute was resolved and, on July 30, 1968, Judgment rendered for Respondents and against Petitioners. No further appeal lies from that Judgment. There is no legitimate question for determination by The Supreme Court of the United States.

STATEMENT OF THE CASE

Garrett Morris and Morris Plan Life Insurance Company, hereinafter referred to as "Petitioners," originally instituted Cause No. 48, 411-C in the 17th Judicial District Court of Tarrant County, Texas, against various trusts created by O. P. Leonard and Marvin Leonard, and against various individual members of the Leonard family, all hereinafter referred to as "Respondents." In general Petitioners complained that a building, which comprised part of the assets of a corporation whose stock was sold by the Respondents to Petitioners in 1955, did not have the value allegedly promised or represented by Respondents. Respondents counterclaimed for recovery of the balance due on certain notes given for the purchase price of the stock.

After a trial lasting approximately a week, the Trial Court withdrew the case from the jury and entered judgment for Respondents on their counterclaims and against Petitioners with respect to their claim for damages. Judgment of the Trial Court was affirmed by the Texas Court of Civil Appeals. Petitioners appealed the decision of the Court of Civil Appeals, and Petitioners' Application for Writ of Error to the Texas Supreme Court was refused, no reversible error.

After Petitioners' Application for Writ of Error was refused by the Texas Supreme Court, Petitioners filed a petition entitled "Bill of Review" in Cause No. 48, 411-C in the 17th Judicial District Court of Tarrant County, Texas. Petitioners sought to set

aside the judgment for Respondents and against Petitioners. Basically, as grounds for their "Bill of Review," Petitioners alleged newly discovered evidence. Respondents filed an "Answer to Bill of Review" and a Motion for Summary Judgment supported by all the prior proceedings in this Cause No. 48, 411-C. Petitioners filed a Reply to the Motion for Summary Judgment filed by Respondents, and Petitioners filed a Counter-Motion For Summary Judgment. A hearing on the respective motions for summary judgment resulted in a rendition by the Trial Court of a summary judgment in favor of Respondents, that Petitioners take nothing by reason of their Bill of Review, and overruling Petitioners' motion for summary judgment. The Texas Court of Civil Appeals affirmed. Petitioners again appealed the decision of the Court of Civil Appeals, and Petitioners' Application For Writ of Error to the Texas Supreme Court was again refused, no reversible error.

An abbreviated version of the facts appears below. The Statement of Facts prepared for the initial trial of this cause, and the exhibits introduced at that trial were attached to Respondents' Motion For Summary Judgment in the second proceeding. Reference will thus be made to portions of the Statement of Facts ("S.F.") and to the exhibits.

A.

Respondents' Acquisition of Insurance Building in Trade With Service Life Insurance Company

In 1953, Service Life Insurance Company of Fort Worth, Texas, ("Service Life") conveyed the Insurance Building to Respondents and received thereby a credit of one million dollars on the purchase price of certain other property conveyed by Respondents to Service Life. (S. F. 309-311; 432; 499).

B.

Sale of Insurance Building to Sloans and Bledsoe

In contemplation of the trade with Service Life, Respondents contracted to sell the Insurance Building to Harry Sloan, Harlan Sloan and Edward Bledsoe for $873,750. (Pl. Exs. 1, 2). The Sloans and Bledsoe contemplated sale of the Insurance Building to a newly organized insurance company, Chiro Life Insurance Company ("Chiro"). A provision of the sales contract between Respondents and the Sloans and Bledsoe was as follows:

> "This contract is specifically conditioned that *the Purchasers* will forthwith diligently proceed to procure from the State Insurance Commissioner, approval of the Insurance Department for the capitalization by the proposed Life Insurance Company who will own the building, at a minimum of $900,000, capital value, and will present said subject to the life Insurance Department and will endeavor to secure approval of such capitalization figure for the property during the week beginning March 23, 1953, and *if the*

> *Purchasers are unsuccessful* in obtaining approval of such minimum capitalization figure, then *at the election of the Purchasers*, this contract may be null and void, if same is not obtained on or before the 10th day of April, 1953." (Emphasis Added.)

The then Commissioner of Insurance, George Butler, approved the capitalization of the Insurance Building in Chiro at $950,000, and the purchase of the Insurance Building by the Sloans and Bledsoe was consummated. (S. F. 388; Pl. Ex. 10). The Sloans and Bledsoe then conveyed the Insurance Building to Chiro. (S. F. 99) A deferred purchase price was represented by deed of trust note executed by Chiro, payable to Respondents in amount $650,000, and a personal note executed by the Sloans and Bledsoe, payable to Respondents in amount $98,750. The Sloans and Bledsoe pledged to Respondents their shares in Chiro as security for payment of the $98,750 note. (Pl. Exs. 4, 5 and 6). Commissioner Butler died, and the new Commissioner of Insurance, Garland Smith, refused to honor Butler's commitment to approve a $950,000 valuation. Smith approved only a valuation of $873,750. (S. F. 386-387). The Sloans and Bledsoe, and Chiro, then reconfirmed and ratified their purchase of the Insurance Building in spite of the reduced approved valuation. Chiro Life received its license as an insurance company on January 13, 1954, after the Sloans had filed a certified balance sheet with the Texas Insurance Commission on January 12, 1954, reflecting "The Building at Insurance Commission appraised value of $873,750." (Def. Exs. 3, 4). Chiro

then occupied the Insurance Building for several months but made no payments on the deferred purchase price therefor. (S. F. 42; 85).

C.

The Sale of Chiro Stock to Petitioners

Upon default by Chiro in paying Respondents the deferred purchase price for the Insurance Building, Respondents effected a voluntary foreclosure of their lien on the Chiro stock, and Respondents turned over the operation of Chiro to Petitioner Garrett Morris, as Trustee for Respondents. (S. F. 182-186; 188). Petitioner Garrett Morris operated Chiro for six months, as Chiro's sole executive officer, then decided to purchase the Chiro stock from Respondents. The Petitioner Garrett Morris merged Chiro with Petitioner Morris Plan Life Insurance Company, of which he was President and majority shareholder. (S. F. 195; Pl. Ex. 14). Pursuant to the terms of the agreement for Petitioners to acquire the Chiro stock, Respondents reduced the amount of the deferred purchase price for the Insurance Building, and Morris Plan executed a note for the reduced amount, $550,000, and a Deed of Trust on the Insurance Building securing the note. (Def. Exs. 18, 19).

In 1956, the Commissioner of Insurance further reduced the approved valuation of the Insurance Building to $700,000 pursuant to a new appraisal thereof. (S. F. 212-213). In 1957 Petitioners obtained a new approved valuation of $750,000. Knowing that the approved valuation had been reduced, Petitioners

executed notes in renewal of the deferred purchase price, in 1956 and in 1962. (S. F. 221-222; Def. Exs. 31a, 31b, 32). As a result of these renewal notes, the deferred purchase price was represented by the $550,000 note executed by Morris Plan; a $150,000 note executed in 1956 by Garrett Morris, personally, in exchange for a credit of $150,000 on the Morris Plan $550,000 note; and a $75,000 surplus debenture executed in 1962 by Morris Plan in exchange for an additional $75,000 credit on the $550,000 note. (S. F. 221-222; 350; Def. Exs. 20, 21, 22, 23, 31a, 31b, 32).

D.

The First Case

On April 25, 1967, fourteen (14) years after Petitioners acquired the Chiro stock from Respondents, Petitioners instituted suit against Respondents for damages and for cancellation of Petitioners' notes in original amounts $550,000, $150,000 and $75,000. Respondents counterclaimed for judgment for the unpaid balances due on the notes and for foreclosure of the deed of trust covering the Insurance Building.

Petitioners complained in the first case, because the approved valuation of the Insurance Building had been reduced by the Insurance Commissioner. Petitioners' theories, set out in "Plaintiffs' Fifth Amended Petition", and in "Plaintiffs' First Amended Original Answer to Defendants' Second Amended Counterclaim", were:

> (1) Respondents had breached an implied covenant of warranty of value of the Insurance

Building when Respondents sold the Building to the Sloans and Bledsoe. Petitioners claimed that as successors in the chain of title to the Sloans and Bledsoe, Petitioners were entitled to damages for breach of the alleged covenant.

(2) The notes executed by Petitioners were illegal, because they were in renewal of a note executed by Chiro for its purchase of the Insurance Building. The note executed by Chiro was illegal, because Chiro allegedly paid too much for the Insurance Building.

(3) The notes executed by Petitioners were not enforceable because there had been a failure of consideration.

(4) The notes executed by Petitioners were unenforceable because their execution had been induced by false representations as to the value of the Insurance Building made by Respondents at the time that Petitioners had acquired the Chiro stock.

(5) The notes executed by Petitioners were unenforceable because an unsatisfied condition precedent to liability thereon, that the Insurance Commissioner approve a valuation of $900,000, was stated in the contract of sale between Respondents and the Sloans and Bledsoe.

In reply to the contentions of Petitioners, Respondents denied the factual allegations of Petitioners and plead waiver, estoppel, compromise and settlement, ratification, release and the two and four year limitation statutes. ("Defendants' Third Amended Original Answer and Counterclaim"; "Defendants' First Supplemental Pleading in Response to Plaintiffs' First

Amended Original Answer to Defendants' Counterclaim")

On July 30, 1968, after hearing all the evidence, the Trial Court withdrew the case from the jury and rendered judgment that Petitioners take nothing and that Respondents recover judgment on the notes executed by Petitioners. The Court of Civil Appeals affirmed the Trial Court, holding as a matter of law that (i) the original transaction wherein the Respondents sold the Insurance Building to the Sloans and Bledsoe was not illegal; (ii) the notes executed by Petitioners were not illegal; (iii) Respondents had committed no fraud in the transaction wherein Petitioners acquired the Chiro stock; (iv) Petitioners were estopped to assert their claims based on the value of the Insurance Building; and (v) Petitioners had no standing to complain of the original transaction between Respondents and the Sloans and Bledsoe. *Morris v. Leonard*, 441 S. W. 2d 877 (Tex. Civ. App. 1969, writ Ref., n.r.e.). Application for Writ of Error filed by Petitioners was refused by the Supreme Court of Texas, "no reversible error." Petitioners did not seek Writ of Certiorari to the United States Supreme Court after final adjudication of the first case by the Texas courts.

E.

Petitioners' "Bill of Review"

On November 27, 1968, after the Trial Court had rendered judgment in the first case, Morris Plan was placed in receivership. On September 12, 1969, the

statutory receiver expressed his opinion that the "highest realistic sales price" which could be obtained at that time for the Insurance Building owned by Morris Plan "would not exceed $200,000," and that "it thus appeared that the sum of $200,000 was the maximum actual value of this property to the receivership estate." (Ex. B, Respondents' Response to Petitioners' Motion for Summary Judgment).

Petitioners then filed a pleading entitled "Bill of Review" apparently making the contention: that the opinion of the Receiver in September, 1969, that the Insurance Building *in September, 1969*, had a value of $200,000 constitutes "new evidence" that the Building *in 1954* had a value not exceeding $200,000 and constitutes "new evidence" that the prior Insurance Department approval of a $750,000 valuation was not final. Petitioners then argued that this "new evidence" conclusively shows that all parties were mistaken at the time of trial as to the value of the Insurance Building in 1954 and were mistaken as to the finality of the previously approved valuation of the Building at $750,000. Petitioners contended that this "new evidence" and "mutual mistake" entitled Petitioners to a new trial.

The Trial Court granted Respondents' Motion for Summary Judgment that Petitioners take nothing by reason of their "Bill of Review," the Texas Court of Civil Appeals affirmed, and Petitioners' Application for Writ of Error was refused by The Supreme Court of Texas, no reversible error.

Petitioners by their Petition for Writ of Certiorari

have seemingly adandoned their quest for relief by bill of review and maintain they are bringing suit on an entirely new cause of action for "new injury." Of course, Petitioners may not properly replead their case in this Court. It is clear, however, that Petitioners are not asserting a new cause of action and also are not entitled to relief via the bill of review route.

ARGUMENT

A.

The Texas Courts Properly Held As a Matter of Law That Petitioners Were not Entitled to Relief Via Bill of Review.

A new trial will not be granted because of newly-discovered evidence unless the following facts appear:

1. The evidence has come to the knowledge of the applicant since the trial;

2. The evidence could not have been discovered at or prior to the time of trial by the exercise of diligence;

3. The evidence is not merely cumulative;

4. The evidence is certain, decisive and so material to the just decision of the case as to be calculated to change the result of the case;

5. The evidence is not for the purpose of impeachment.

In *New Amsterdam Casualty Company v. Jordan*, 359 S. W. 2d 864 (Tex. 1962), the Texas Supreme Court quoted with approval at 359 S. W. 2d 866:

" 'A new trial will not be granted on the ground

> of newly-discovered evidence, unless it is made to appear that it has come to the knowledge of the applicant since the trial; that it could not have been sooner discovered by the exercise of diligence; that it is not merely cumulative; that it is not for the purpose of impeachment.' Conwell v. Gulf, C.&S. F. Ry. Co., 85 Tex. 96, 19 S. W. 1017 (1892)."

The same rules apply to bills of review as to motions for new trial. As stated in *Kelley v. Wright*, 184 S. W. 2d 649 (Tex.Civ.App. 1944, aff'd. 188 S. W. 2d 983), at 184 S. W. 2d 654:

> "A liberal application of the rules of equity demands that the same principle involved by a motion seasonably filed for new trial on grounds of newly discovered evidence, at the term of court at which a judgment was rendered be applied to belated motions partaking of the nature of equitable bills of review.
>
> "The recognized rule in the former class of motions seems to be that much discretion is given to the trial court in passing upon the issues and unless there appears an abuse of discretion his ruling will not be disturbed. 25 Tex.Jur. 590 sec. 188. In 31 Tex.Jur. 104, sec. 92, this is said: 'If the (newly discovered) evidence is circumstantial it should be of a conclusive tendency, or at least ought very satisfactorily to establish the fact sought to be proved. ***' Ibid, 196 sec. 94, it is said: 'But the court should deny the motion if the evidence alleged therein is uncertain and inconclusive in character, of slight probative value, or probably untrue.' "

The evidence relied upon by Petitioners does not meet the tests prescribed above.

1. The evidence has not come to Petitioners' knowledge since the trial. Petitioners contended in their pleading entitled "Bill of Review" (a) that all parties mistakenly believed at the time of trial that the Building had a value in 1954 of $750,000; and (b) that all parties mistakenly believed at the time of trial that the Insurance Department had finally and irrevocably approved a valuation of $750,000.

As a matter of law neither contention is sustainable. Petitioners, themselves, introduced evidence at the trial that the value of the Building in 1954 was less than $750,000. Petitioners' witness, Harlan Sloan, testified that the actual cash market value of the Building in the summer of 1954 would not have been "in excess of $400,000." (S. F. 81-82) Petitioners vouched for this witness and his testimony. That testimony conclusively shows that Petitioners did not mistakenly believe at the time of trial that the Buildnig had a value of $750,000.

The Insurance Department Order of May 2, 1958, setting a value of $750,000, *expressly states* that such valuation is not final and irrevocable. Article 3.40, Texas Insurance Code, provides that Insurance Company realty may be appraised *at any time* when an examination of the company is being made. At the trial Petitioner Garrett Morris testified as follows:

> "Q: Is it quite possible, Mr. Morris, that the Commissioner will never determine what this Building is worth?

"A: Well, they are still questioning it.

"Q: It's quite possible they may never just make up their minds, isn't it?

"A: Yes, it's quite possible." (S. F. 256)

The foregoing conclusively shows that Petitioners did not mistakenly believe at the time of trial that the valuation approved by the Insurance Department in 1958 was final and irrevocable.

2. The evidence could have been discovered at or prior to the time of trial by the exercise of diligence. As pointed out in the trial of this cause, Petitioners have known for fourteen (14) years that the Building did not have the value Petitioners alleged or reasonably expected. (S.F. 221, 223, 226, 230) If Petitioners wanted to know more about its value, the Building could have been appraised at any time. Petitioners could have obtained and adduced additional evidence of value at the trial. In *Brannen v. City of Houston*, 153 S.W.2d 676 (Tex.Civ.App. 1941, writ ref.), the losing party sought relief by bill of review, claiming that he was ignorant of jury misconduct at the time he could have filed a motion for new trial. The Court denied the requested relief, stating at 153 S.W.2d 678:

> "The remedy for setting aside a jury's verdict for misconduct is to allege the facts constituting such misconduct in the motion for a new trial, and at the time the motion for a new trial is presented the hearing is had on the alleged misconduct of the jury. Appellant did not avail himself of such remedy. But there is no contention made that appellee in any way prevented appellant from availing himself of such remedy. It is

not pretended that appellee so much as knew of the alleged jury misconduct. Yet appellant is here asking that appellee be deprived of the vested right which it acquired in consequence of the judgment having become final. This vested right could be taken away from appellee only by a court of equity, *and the only ground for a court of equity setting aside a final judgment by a Bill of Review is by showing that appellant was prevented from making out his case by fraud, accident or the wrongful act of appellee, unmixed with any fault or negligence of his own.* Now the only excuse that appellant has for not availing himself of his legal remedy to set the verdict aside through his motion for new trial is that he was ignorant that the alleged misconduct had occurred, and that his attorneys were ignorant that the alleged misconduct had occurred. It is true that he attempts to excuse his failure to discover such misconduct on the ground that he was poor and infirm. But he makes it appear from his pleading that he had counsel who prepared and filed his motion for new trial. Their failure to discover and allege jury misconduct in the motion for new trial, as already pointed out, was not chargeable to appellee, and consequently appellee may in all good conscience retain the right vested in it by the judgment. In this connection, we quote as being here applicable this language from Smith v. Farrell, Tex.Com.App., 44 S.W. 2d 962, 966: 'If the judgment of Courts were liable to be set aside, and new trials granted on such grounds as these, there would, indeed, never be an end of litigation. It has been well said, that, "If mistakes in practice or inadvertence furnished reason for a new trial, it would encourage litigation and reward ignorance and carelessness

> at the expense of the other party." (6 Rep. 9.) And, therefore, the law in such cases wisely acts upon the maxim, Interest republicae ut sit finis litium—it is for the public good that there be an end of litigation.' " (Emphasis added.)

It does not help Petitioners to couch their "new evidence" contentions in terms of "mutual mistake." It is true that "where, through no fault of his own, a party has been prevented by fraud, accident, or mistake from prosecuting his suit or making his defense," the party may sometimes get relief by bill of review. 34 Tex.Jur.2d 19, Judgment, §188. But, the fraud or mistake must be based upon extrinsic rather than intrinsic facts; that is, it must be collateral to the issues actually tried and adjudicated. In *Ridge v. Wood*, 140 S.W. 2d 536 (Tex. Civ. App. 1940, writ dism., judg. corr.), the Court stated at 140 S.W. 2d 541-542:

> "Petitioners who seek, by an action in the nature of a bill of review, to set aside a judgment rendered at a former term of the court, and from which there was no appeal, cannot be heard to urge defenses that they could have presented in the former suit, unless upon a showing that they were there prevented from so doing by wrongful acts or conduct of the opposing party, recognized in equity as fraud or mistake; nor can such petitioners complain of judicial errors, however prejudicial, which could have been corrected on appeal.
>
> "Such judgment is conclusive as to all defenses which could have been raised, in the absence of extrinsic facts, such as fraud, accident or mistake, justifying relief."

Since the question of the value of the Insurance Building was before the Court at the initial trial, "new evidence" of value is not an extrinsic fact. Extrinsic facts are distinguished from intrinsic facts in 34 Tex.Jur.2d 48-51, Judgments, §205:

> "Fraud as bearing on the validity of a judgment is either intrinsic or extrinsic. However, the acts or conduct for which equity will annul a judgment rendered by a court of competent jurisdiction have relation to fraud extrinsic or collateral to the matter tried and not to fraud in the matter on which the judgment was rendered. By extrinsic fraud, as opposed to intrinsic fraud or fraud involved in the issues actually determined, is meant that fraud which deprived a party from either knowing about his rights or defenses, or from having a fair opportunity of presenting them at the trial. Thus, equity will not set aside a judgment because it was founded on a fraudulent assertion of rights by a cross-action, or for any matter that was actually presented and considered in giving the judgment.
>
> "A judgment will not be vacated for fraud when the particular fraud in question was actually or potentially an issue in the original proceeding."

A case distinguishing the mistake for which relief may be granted from the "new evidence" type mistake is *Metropolitan Life Ins. Co. v. Pribble*, 130 S.W. 2d 322 (Tex. Civ. App., 1939, writ ref.). In that case an insured had recovered judgment against an insurance company under a policy providing benefits where an insured had "become so disabled as a result of bodily injury or disease, as to be prevented permanently

from engaging in any occupation and performing any work for compensation or profit." A jury had found the insured disabled within the terms of the policy. In a new suit, the insurance company later sought to set aside the Judgment based upon mistake in the form of new evidence that the insured had re-entered the employment of his former employer, thus could not be disabled under the terms of the policy. The Court refused to set aside the original Judgment, stating at 130 S.W. 2d 338:

> "Neither fraud nor any facts showing accident were alleged by defendant as a ground for attacking the former judgment in any particular. The only ground of attack was the alleged mistake in the finding that as the result of his injury plaintiff had been totally and permanently disabled during the remainder of his life, within the meaning of the terms of his insurance policy; with the further ground added that plaintiff's resumption of work after rendition of the judgment, in the manner pleaded, conclusively showed that the finding in the former judgment, that plaintiff was totally and permanently disabled, was untrue.
>
> "That pleading was essentially an application for re-trial of the case on the ground of newly discovered evidence, discovered after the former judgment had been rendered and had become final on appeal. While a trial court may set aside a verdict and grant a new trial for newly discovered evidence, if the complainant shows reasonable ground for his failure to discover it earlier, that relief is not available in a suit in equity to set aside the judgment after it has become final. The mistake authorizing the vacation of a judg-

> ment by bill of review usually relates to matters incident to the trial in the lower court, which prevented a party defendant from making a valid defense on the trial, numerous instances of which are to be found in many authorities, such as 25 Tex.Jur., pp. 610-623, inclusive."

And at 130 S.W. 2d 336, the Court quoted with approval:

> " 'It is well settled that the decision of a court of competent jurisdiction is conclusive, not only as to the subject matter determined, but as to every other matter which the parties might have litigaed in the case and which they might have had decided. Danaher v. Prentiss, 22 Wis. [311] 316; Bates v. Spooner, 45 Ind. [489] 493; LeGuen v. Gouverneur, 3 Johns. Cas. 605 [1 Johns. Cas., 436, 506, 1 Am Dec. 121]; Shettlesworth v. Hughey, 9 Rich. [S. C.] 387. Or, as differently expressed, "the plea of res judicata applies not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, by exercising reasonable diligence, might have brought forward at the time." ' "

3. The evidence is merely cumulative. Two witnesses testified at the time of trial about the value of the Building. Petitioners' witness, Harlan Sloan, testified the Building had a value of $400,000 in 1954. (S.F. 80-82) Jenkins Garrett testified the Building had a value of $873,750 in 1953 and $650,000 in 1954. (S.F. 338; 349) Any further evidence of the value of the Building would obviously be cumulative. In effect,

Petitioners asserted in their "Bill of Review" that there is new evidence as to the *degree* of Petitioners' damages. The Supreme Court has held that "new evidence" of this type is merely cumulative and does not afford a basis for a new trial. *New Amsterdam Casualty Company v. Jordan*, 359 S.W. 2d 864 (Tex. 1962). In that case Plaintiff in a compensation case had recovered judgment based on jury findings of total incapacity for 55 weeks and partial incapacity for 75 additional weeks. At the time of trial Plaintiff had had one operation for his back injury. Original judgment was entered July 25, 1960. After judgment was entered, but prior to the expiration of the time for filing a motion for new trial, Plaintiff had a second back operation. As grounds for new trial, Plaintiff then urged that the second operation was new evidence proving that his temporary incapacity would extend longer than 75 weeks. The Trial Court denied the Motion for New Trial, and the Court of Civil Appeals reversed, holding that the Trial Court had abused its discretion in denying the Motion. The Supreme Court reversed the Court of Civil Appeals Judgment and affirmed the Trial Court Judgment, holding that the "new evidence" was merely cumulative. The Supreme Court stated at 359 S.W. 2d 867-868:

> "On the other hand, the after-trial evidence in the case at bar, consisting of a second back operation over three years after the injury, two years and nine months after the trial of the case, was not 'dissimilar to that used upon the trial' and was 'additional evidence of the same kind to the same point' as that introduced at the trial touching the question of respondent's incapacity. It is true that

> the second back operation was a new fact but it did not 'bring to light a new and independent truth,' and we do not think it can be said that respondent has not had his day in court or that the requirements for overriding the public policy requiring finality of trials have been met. Moreover, the evidence does not, in our opinion, partake of a conclusiveness and decisiveness upon the merits of the case to the extent of showing that justice has not been attained and that, as a matter of law, the trial court abused its discretion in denying the motion.
>
> "Apart, then, from the question of whether or not the post-trial facts alleged in the motion for a new trial were sufficiently established at the hearing (which we do not decide), we hold that the Court of Civil Appeals erred in reversing and remanding the case for another trial upon the ground of newly discovered evidence."

After the Supreme Court Judgment in *New Amsterdam*, supra, the Plaintiff had a *third* operation for his back injury. He then filed a bill of review asserting that the prior judgments were due to fraud, accident, or mistake, without negligence on his part, and that there had been a material change in his physical condition. Plaintiff contended fraud and mistake in that doctors had testified at his original trial that Plaintiff would not need further surgery. The Court of Civil Appeals refused to entertain the bill of review, *Jordan v. New Amsterdam Casualty Company*, 378 S.W. 2d 890, 893 (Tex. Civ. App. 1964, writ ref., n.r.e.), saying:

> "Thus it is seen that while the third operation is

a new factor or occurrence, it does not bring to light a new and independent truth. It was performed to relieve the same results of the injury, and pain in the same part of appellant's body generally, as the other two operations. Appellant's injury and incapacity, if we apply 'hindsight,' might possibly be shown to be greater now than anticipated during the trial in 1959, but no new and independent facts or truths are brought out which disassociate such incapacity and injury from the original injury and the first two operations and attendant consequences of the same. The mere fact that at the time the bill of review was filed appellant's physical condition may have deteriorated and it might be established that he was injured more severely than anticipated at the time of trial, would not be sufficient to set aside the final judgment rendered in 1959. Moreover, the evidence now relied upon by appellant is merely cumulative of that brought out at the trial in 1959, just as the evidence of the second operation adduced on the hearing of appellant's motion for new trial was cumulative with respect to his injury. The fact that the third operation was not at the same place on appellant's back does not prevent such evidence from being cumulative, since it was to relieve the same condition and pain that necessitated the first two operations."

4. The evidence is uncertain, inconclusive, and in fact, incompetent. The evidence is not material and would not conceivably change the result of the case. Evidence of the sales price of the Building in 1969 is not evidence of its fair market value in 1954. The Court cannot as contended by Petitioners, take judi-

cial notice that all buildings have increased in value since 1954, because they haven't done so. Obsolete buildings have become less valuable, and in some cases useless and a liability. Even if the evidence were competent, and tended to prove a $200,000 value in 1954, still the evidence would not be material. As the Trial Court and each appellate court has held, Petitioners have waived, and are estopped from asserting, any complaints based on value of the Building. Moreover, all courts have rejected Petitioners' claims based on misrepresentation and breach of implied warranty. Where there is no basis for a claim of misrepresentation or breach of warranty, what difference would it make if the parties had been mistaken about the value of the Building? All courts have held as a matter of law that (1) Respondents had no obligation to convey a Building of any certain value to Petitioners, and (2) Petitioners have waived, and are estopped to assert, any complaints concerning the value of the Building.

B.

Petitioners Have Already Been Afforded A Trial On Their Alleged Cause of Action

After judgment was rendered for Respondents in the second case, Petitioners then attempted to change their position, asserting that they were really suing on a new cause of action rather than seeking relief via bill of review. As grounds for such "new" cause of action, Petitioners assert that: (1) Respondents breached their 1953 contract with the Sloans and Bledsoe, because Respondents failed to deliver to the

Sloans and Bledsoe a building with an Insurance Department approved valuation of at least $900,000; and (2) Petitioners, as successors in the chain of title to the Insurance Building are entitled to assert the rights of the Sloans and Bledsoe.

The amazing fact is that there is nothing new about these allegations. Both allegations were made in the first case. The Court of Civil Appeals held in the first case that Respondents did not breach their contract with the Sloans and Bledsoe. The Court of Civil Appeals also held that Petitioners would have no standing to complain of the breach of a contract to which Petitioners were not a party, even if there had been a breach. The judgment in the first case is final. All appeals of that judgment have been exhausted. That judgment is res judicata of the claims now being asserted by Petitioners.

Petitioners speak of "a contract of a continuing nature," but Petitioners fail to state any basis for contending that Respondents' contract with the Sloans and Bledsoe was of a continuing nature. The contract contained no agreement by Respondents that the Insurance Department would approve in perpetuity a particular value for the Insurance Building. In fact, the contract contained no agreement that Respondents would *initially* deliver a building with a particular approved value. The contract merely gave the Sloans and Bledsoe an *option* to avoid the contract if the Insurance Department did not approve a particular value for the building prior to April 10, 1953. The Sloans and Bledsoe elected not to exercise the option.

The Court of Civil Appeals held in the first case that Petitioners were estopped to complain of the value of the Insurance Building. This estoppel holding is also res judicata of the claims now asserted by Petitioners.

C.

A "New" Cause of Action Would Be Barred By Limitations

Respondents in the first and second cases plead the two and four year statutes of limitation. Even if the judgment in the first case were not res judicata of the claims of Petitioners, Petitioners' claims of breach of a 1953 contract, asserted in 1969, are obviously barred by limitations as a matter of law.

CONCLUSION AND PRAYER

There being no constitutional questions raised in this case, and Petitioners' claims being clearly without merit, Respondents pray that Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing shall be personally delivered before April 26, 1971, to the Honorable Ernest May, Attorney for Petitioners, 1804 W. T. Waggoner Building, Fort Worth, Texas 76102.

Warren W. Shipman III

WARREN W. SHIPMAN III